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No. 317

In the

Supreme Court of the United States

OCTOBER TERM, 1962

HARDWARE MUTUAL CASUALTY COMPANY,
Petitioner,

v.

ADAM McINTYRE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMENDED BRIEF IN OPPOSITION

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AMENDED BRIEF OF THE RESPONDENT IN OPPOSITION

MOTION TO WITHDRAW ORIGINAL BRIEF IN OPPOSITION

Respondent McIntyre respectfully moves to withdraw his Original Brief in Opposition to the Petition for Writ of Certiorari, and substitute in lieu thereof the following Amended Brief. The original brief pointed out that jurisdictional amount in McIntyre did not even exist under the

state test for determining the amount in controversy. Since Federal jurisdictional amount is determined by Federal standards, to avoid any confusion and for purposes of clarity, the Respondent desires to substitute this shorter brief.

Respectfully submitted,

JOE H. TONAHILL

PRELIMINARY STATEMENT

This action involves the matter of the requisite amount in dispute between diverse parties for federal jurisdiction. Recently this Court decided the question in *Horton v. Liberty Mutual Insurance Company, 367 U. S. 348*. There, the insurer brought suit to relieve itself of a $1,050,000 debt to Horton ordered by the Industrial Accident Board of Texas. Horton moved for a dismissal for want of the requisite amount of $10,000.00 in dispute and counterclaimed subject to his motion to dismiss for $14,035.00. The District Court dismissed.

Here, in McIntyre, the Petitioner, Hardware Mutual Casualty Company (of Wisconsin), filed suit in Federal Court to set aside an award of the Industrial Accident Board of Texas against it in favor of McIntyre in the sum of $330.15. McIntyre moved to dismiss for lack of the requisite jurisdictional amount of $10,000.00 and counterclaimed for $9,000.00. The Federal Judge dismissed for lack of jurisdiction.

We adopt the arguments of Respondents Hart and Aguirre in 318 and 319 currently pending before this Court.

QUESTION PRESENTED

Does a requisite Federal jurisdictional amount exist in a workmen's compensation insurer's appeal de novo diversity suit to set aside administrative board's award of less than $10,000.00 where defendant-employee (Respondent McIntyre) counterclaims for less than $10,000.00 in Federal court?

STATEMENT

Petitioner Hardware Mutual Casualty Company erroneously contended and contends that the State test applies as announced by the Supreme Court of Texas in *Booth v. Texas Employers' Insurance Association*, 123 S. W. 432 and the decision of the Fifth Circuit Court of Appeals in *Liberty Mutual Insurance Company v. Horton*, 275 F. 2d 148 which was clearly rejected by this Court in both the majority opinion by Mr. Justice Black and the vigorous dissent by Mr. Justice Clark.

Below, the Fifth Circuit Court of Appeals in this McIntyre case, in carefully following the mandate of this Court in Horton, clearly held that the requisite Federal jurisdictional amount did not exist.

We respectfully state that Your Honors correctly decided the crucial question in Horton as stated by Mr. Justice Black in part as follows:

> "We agree with petitioner that determination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be decided under federal standards, * * *".

rejecting the state standards as announced in *Booth v. Texas Employers' Insurance Association, 123 S. W. 2d 322,* and which was contended for by respondent-insurer Liberty Mutual Insurance Company.

We furthermore respectfully urge that in addition to re-affirming the test laid down by the majority in Horton, it would greatly serve alike the interests of the bench and bar of this nation if Your Honors would adopt the view contained in the dissent by Mr. Justice Clark in Horton.

We say this in the hope that Your Honors will set at rest for all time the important matter of requiring that the federal jurisdictional amount be determined from the causes of action alleged by the plaintiff-insurer without reference to the prospective or potential claim of the defendant-employee (Horton).

Therefore, perhaps certiorari should be granted here in order that Your Honors re-examine the *Horton* decision and curtail jurisdiction in those cases where the employee counterclaims for less than $10,000.00 in Federal court though he sues directly in state court for an amount in excess of $10,000.00 as prescribed for the state test in *Booth v. Texas Employers' Insurance Association 123 S .W 2d 322, Article 8306, Section 10, and Article 8307, Section 5, VACS.*

SUMMARY OF ARGUMENT

As stated, we adopt by reference the arguments of Respondents in the Hart (No. 318) and the Aguirre (319) now currently pending before Your Honors.

An incorrect jurisdictional allegation cannot and does not determine jurisdiction. *McNutt v. General Motors Acceptance Corporation, 298 U. S. 178.* McNutt has the right to counterclaim for less than $10,000.00 for the express purpose of defeating Federal jurisdiction. *St. Paul Mercury Indemnity Company v. Red Cab, 303 U. S. 283, 294.*

The Workmen's Compensation Act of Texas and its substantive features in a suit to set aside the Industrial Accident Board's award does not revive the amount of the claim made by the employee before the Industrial Accident Board as held in *Booth v. Texas Employers' Insurance Association, 123 S. W. 2d 322 where Federal jurisdiction is concerned.*

Therefore the appeal of Hardware Mutual Casualty Company to the Federal court from the Board's award does not and cannot put into issue the employee McIntyre's right to compensation. Before such an issue as to the requisite jurisdictional amount in excess of $10,000.00 can be raised, the employee McIntyre must affirmatively counterclaim for an amount in excess of $10,000.00 and of course here this was not done. Therefore, jurisdiction did not attach in Federal court and the Federal Judge was correct in dismissing. Actually what the Petitioner Hardware Mutual Casualty Company is contending for is a right sounding declaratory in nature. Declaratory judgment cases are not applicable. *Article 8307, Section 5, VACS; Booth v. Texas Employers' Insurance Association, 123 S. W. 2d 332; Morris v. Maryland Casualty Company, 130 S. W. 2d 1080.* Thus, the largest judgment by the Federal Court that could be rendered in this *McIntyre* case when the insurance com-

pany filed its suit in Federal court would simply be the amount of the Board's award which was $330.15. Not having jurisdiction for this amount, of course the Federal Judge could not entertain it.

The largest amount that could be rendered by the Federal Judge after Respondent McIntyre's Answer and Counterclaim would be the amount of the counterclaim which was $9,000.00. This being less than the requisite $10,000.00 jurisdictional amount, the Federal Judge was correct in not entertaining it either.

It is therefore a legal certainty that the Federal Court could never have entered a judgment above the jurisdictional minimum of $10,000.00. Therefore this impossibility to enter a judgment for more than $10,000.00, the Federal Judge was correct in deciding that federal jurisdiction inevitably failed. *Vance v. VanDercoo Key Company, 170 U. S. 467, 472; Horton v. Liberty Mutual Insurance Company, 367 U. S. 348, 353.*

Your Honors reaffirmed the Federal test in *Horton v. Liberty Mutual Insurance Company, 367 U. S. 348,* in deciding that an amount an employee claims before the Industrial Accident Board does not determine or fix Federal jurisdiction. For the same reason, the amount claimed under a collateral state court suit cannot be used to determine federal jurisdiction. *Healy v. Ratta, 292 U. S. 263; Elgin v. Marshall, 106 U. S. 578.*

Naturally the Federal Courts do not have any power to restrict an employee's claim before state courts. *28 U. S. C.*

Section 2283; Amalgamated Clothing Workers v. Richman, 348 U. S. 511.

The Petitioner Hardware Mutual Casualty Company has the duty to show jurisdiction. There is no obligation on the part of the Federal court to find jurisdiction if it doesn't appear from the pleadings. This is especially true since the policy of the Federal judiciary is now and has always been against expansion of federal jurisdiction. It is readily recognized that the duty to dismiss such a contest for want of jurisdiction exists as it did in *Healy v. Ratta, 292 U. S. 263; American Fire & Casualty Company v. Finn, 341 U. S. 6.* There is no legal inconsistency in holding that the employee has a right to claim less than $10,000.00 in Federal court in order to defeat Federal jurisdiction and subsequently claim more than $10,000.00 in state court. This court has repeatedly allowed such right under its decisions. *St. Paul Mercury Indemnity Company v. Red Cab Company, 303 U. S. 283, 294; Amalgamated Clothing Workers v. Richman, 348 U. S. 511; 28 U. S. C. Section 2283.*

CONCLUSION

The only valid reason for granting certiorari here would be if the Court wished to re-examine the *Horton* decision in view of the fact that the four dissenting members of this court in *Horton v. Liberty Mutual, 367 U. S. 348*, speaking through Mr. Justice Clark, clearly demonstrated that the amount in controversy had to be determined from the plaintiff's cause of action without reference to what the defendant would claim. The majority upheld jurisdiction because

the plaintiff correctly alleged that the defendant would claim more than $10,000.00 in Federal court even though it was not a counterclaim subject to his motion to dismiss.

It is respectfully prayed that certiorari be denied.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I, Joe H. Tonahill, of counsel for Respondent, do hereby certify that service of a copy of the foregoing Amended Brief in Opposition to Petition for Writ of Certiorari has been made on Petitioner by mail in accordance with the rules of this Court.

Dated this 22nd day of September, A. D. 1962.

Joe H. Tonahill
Joe H. Tonahill,
of Counsel for Respondent.